

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERRY L. SOUTHERN,)	
)	No. CV-10-00212-JPH
Plaintiff,)	
)	
v.)	
)	ORDER GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 22, 27.) Attorney Maureen Rosette represents Terry L. Southern (Plaintiff); Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** the Defendant's motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) on June 25, 2007. (Tr. 16; 82; 163.) He alleged disability due to problems with his lower back, COPD, neuropathy in knees and feet, sleep apnea and diabetes with an alleged onset date of October 3, 2003. (Tr. 162; 168.) His claim was denied initially and on

1 reconsideration. (Tr. 88-90; 100-02.) Plaintiff requested a hearing
2 before an administrative law judge (ALJ), which took place on
3 September 9, 2009. (Tr. 34-81.) Plaintiff, who was represented by
4 counsel, and medical expert James Haynes and vocational expert
5 Deborah Lapoint also testified at the hearing. The ALJ denied
6 benefits on September 16, 2009, and the Appeals Council denied
7 review. (Tr. 16-27; 1-5.) The instant matter is before this court
8 pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings and are briefly summarized here. At the time of the
12 hearing, Plaintiff was 50 years old with an eleventh grade
13 education. (Tr. 44; 82.) He lives in a house with his wife and son.
14 (Tr. 147.) He reported that his daily activities included caring for
15 his dogs and watching television, and he fishes twice per season.
16 (Tr. 159.) Plaintiff worked loading vinyl material into a machine to
17 make window frames between 1993 and 1999. (Tr. 53-54.) He also
18 worked briefly as a hotel worker, an inventory worker at a retail
19 store and a bakery worker. (Tr. 54-55; 133.) Plaintiff used
20 methamphetamine in 2005, and was imprisoned on related charges from
21 October 2006 to March 2007. (Tr. 53; 68.) He testified that after
22 October 2003, he was prevented from working because he could not
23 stand for long periods of time due to back and foot pain. (Tr. 56.)
24 He also asserted that he suffered from chronic back pain, pain and
25 numbness in his feet, high blood sugars and breathing problems.
26 (Tr. 220.)

27 **SEQUENTIAL EVALUATION PROCESS**

28 The Social Security Act (the Act) defines disability as the

1 "inability to engage in any substantial gainful activity by reason
2 of any medically determinable physical or mental impairment which
3 can be expected to result in death or which has lasted or can be
4 expected to last for a continuous period of not less than twelve
5 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
6 provides that a Plaintiff shall be determined to be under a
7 disability only if any impairments are of such severity that a
8 plaintiff is not only unable to do previous work but cannot,
9 considering plaintiff's age, education and work experiences, engage
10 in any other substantial gainful work which exists in the national
11 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the
12 definition of disability consists of both medical and vocational
13 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

14 The Commissioner has established a five-step sequential
15 evaluation process for determining whether a person is disabled. 20
16 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is
17 engaged in substantial gainful activities. If so, benefits are
18 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
19 the decision maker proceeds to step two, which determines whether
20 plaintiff has a medically severe impairment or combination of
21 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

22 If plaintiff does not have a severe impairment or combination
23 of impairments, the disability claim is denied. If the impairment is
24 severe, the evaluation proceeds to the third step, which compares
25 plaintiff's impairment with a number of listed impairments
26 acknowledged by the Commissioner to be so severe as to preclude
27 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
28 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the

1 impairment meets or equals one of the listed impairments, plaintiff
2 is conclusively presumed to be disabled. If the impairment is not
3 one conclusively presumed to be disabling, the evaluation proceeds
4 to the fourth step, which determines whether the impairment prevents
5 plaintiff from performing work which was performed in the past. If
6 a plaintiff is able to perform previous work, that Plaintiff is
7 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
8 416.920(a)(4)(iv). At this step, plaintiff's residual functional
9 capacity (RFC) assessment is considered. If plaintiff cannot perform
10 this work, the fifth and final step in the process determines
11 whether plaintiff is able to perform other work in the national
12 economy in view of plaintiff's residual functional capacity, age,
13 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish
16 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
17 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
18 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
19 plaintiff establishes that a physical or mental impairment prevents
20 the performance of previous work. *Hoffman v. Heckler*, 785 F.3d 1423,
21 1425 (9th Cir. 1986). The burden then shifts, at step five, to the
22 Commissioner to show that (1) plaintiff can perform other
23 substantial gainful activity and (2) a "significant number of jobs
24 exist in the national economy" which plaintiff can perform. *Kail v.*
25 *Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984); *Tackett v. Apfel*, 180
26 F.3d 1094, 1099 (1999).

27 ///

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ADMINISTRATIVE DECISION

ALJ Hebda found Plaintiff was insured for DIB¹ from October 3, 2003 through December 31, 2004. (Tr. 18.) At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since October 3, 2003. (Tr. 18.) At step two, he found Plaintiff had severe impairments of diabetes mellitus, peripheral neuropathy of the feet, and shortness of breath probably secondary to smoking. (Tr. 18.) The ALJ determined at step three Plaintiff's medically determinable impairments, alone and in combination, did not meet or medically equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 19.) The ALJ found Plaintiff's subjective complaints regarding functional limitations were not fully credible. (Tr. 22.) At step four, the ALJ concluded plaintiff had a residual functional capacity to perform less than a full range of light work:

The claimant could lift or carry 20 pounds occasionally and frequently lift or carry 10 pounds. The claimant could sit for six hours and stand or walk for two hours in an eight-hour workday. He could occasionally climb ramps or stairs. He could occasionally balance, stoop, kneel, crouch or crawl. He could not climb ladders, ropes, or scaffolds. He should have avoided [sic] concentrated exposure to cold, heat, wetness, moving machinery, and unprotected heights.

(Tr. 20.)

The ALJ concluded that Plaintiff was unable to perform his past relevant work. (Tr. 25.) After considering Plaintiff's age, education, work experience, and residual functional capacity, the ALJ found that jobs exist in significant numbers in the national economy that claimant could have performed, such as sewing machine

¹Plaintiff applied for and received Title XVI benefits that began on June 25, 2007. (Tr. 16.)

1 operator, cashier and telemarketer. (Tr. 25-26.) The ALJ concluded
2 that Plaintiff has not been under a disability from October 3, 2003
3 through the date of the decision. (Tr. 26.)

4 STANDARD OF REVIEW

5 Congress has provided a limited scope of judicial review of a
6 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the
7 Commissioner's decision, made through an ALJ, when the determination
8 is not based on legal error and is supported by substantial
9 evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985);
10 *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The [Commissioner's]
11 determination that a plaintiff is not disabled will be upheld if the
12 findings of fact are supported by substantial evidence." *Delgado v.*
13 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. §
14 405(g)). Substantial evidence is more than a mere scintilla,
15 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975),
16 but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,
17 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human*
18 *Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence
19 "means such evidence as a reasonable mind might accept as adequate
20 to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
21 (1971) (citations omitted). "[S]uch inferences and conclusions as
22 the [Commissioner] may reasonably draw from the evidence" will also
23 be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
24 On review, the Court considers the record as a whole, not just the
25 evidence supporting the decision of the Commissioner. *Weetman v.*
26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*,
27 648 F.2d 525, 526 (9th Cir. 1980).

28 It is the role of the trier of fact, not this Court, to resolve

1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
2 supports more than one rational interpretation, the Court may not
3 substitute its judgment for that of the Commissioner. *Tackett*, 180
4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
5 Nevertheless, a decision supported by substantial evidence will
6 still be set aside if the proper legal standards were not applied in
7 weighing the evidence and making the decision. *Browner v. Secretary*
8 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
9 Thus, if there is substantial evidence to support the administrative
10 findings, or if there is conflicting evidence that will support a
11 finding of either disability or nondisability, the finding of the
12 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
13 1230 (9th Cir. 1987).

14 ISSUES

15 The question is whether the ALJ's decision is supported by
16 substantial evidence and free of legal error. Plaintiff contends
17 that the ALJ erred in his credibility assessment of Plaintiff and by
18 giving significant weight to the opinion of James M. Haynes, M.D.
19 (ECF No. 23 at 12-19.) Defendant contends the ALJ's decision is
20 supported by substantial evidence and is free of legal error. (ECF
21 No. 28 at 8-15.)

22 DISCUSSION

23 1. Credibility.

24 Plaintiff complains that the ALJ erred by finding his testimony
25 about the severity of his symptoms not credible. (ECF No. 23 at 17.)
26 Plaintiff also complains that the ALJ failed to specify Plaintiff's
27 particular testimony that he relied upon in finding diminished
28 credibility. The Commissioner's credibility determination must be

1 supported by findings sufficiently specific to permit the court to
2 conclude the ALJ did not arbitrarily discredit claimant's testimony.
3 *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)(en banc).
4 If no affirmative evidence exists that the claimant is malingering,
5 the ALJ must provide "clear and convincing" reasons for rejecting
6 the claimant's testimony regarding the severity of symptoms.
7 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

8 The ALJ engages in a two-step analysis in deciding whether to
9 admit a claimant's subjective symptom testimony. *Smolen v. Chater*,
10 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step, the
11 claimant must produce objective medical evidence of an underlying
12 medically determinable impairment, and must show that the
13 impairment, or a combination of impairments, "could reasonably be
14 expected to produce pain or other symptoms." *Cotton v. Bowen*, 799
15 F.2d 1403, 1405 (9th Cir. 1986).

16 Once the *Cotton* test is met, the ALJ must evaluate the
17 credibility of the claimant. When assessing a claimant's
18 credibility, the lack of objective medical evidence is a proper
19 factor to consider along with: a claimant's treatment history; daily
20 activities; work record as well as the claimant's reputation for
21 truthfulness; inconsistencies in her testimony, or between her
22 testimony and conduct observations of physicians and third parties
23 with personal knowledge of the claimant's symptoms. *Tommasetti v.*
24 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Light v. Soc. Sec.*
25 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). In addition, an
26 adjudicator may draw adverse inferences from a claimant's failure to
27 seek treatment for symptoms for months after the alleged onset of
28 disability. *Bruton v. Massanari*, 208 F.3d 824, 828 (9th Cir. 2001).

1 If the ALJ finds a claimant's statements are not entirely
2 credible, he need not reject totally a claimant's symptom testimony.
3 The ALJ may find the claimant's statements about pain to be credible
4 to a certain degree, but discount statements based on his
5 interpretation of evidence in the record as a whole. *SSR 96-7p*. If
6 the ALJ's credibility findings are supported by substantial evidence
7 in the record, the court may not engage in second-guessing. See
8 *Morgan v. Commissioner, Soc. Security Admin.*, 169 F.3d 595, 600 (9th
9 Cir. 1999); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).

10 In this case, the ALJ found that Plaintiff's statements
11 concerning the intensity, persistence and limiting effects of his
12 reported symptoms were not entirely credible. (Tr. 22.) The ALJ
13 found that Plaintiff was not compliant with treatment related to
14 Plaintiff's failure to monitor his blood sugar, and that Plaintiff's
15 diabetes mellitus was non-insulin dependent and under control. (Tr.
16 22.) The ALJ noted that the record did not contain medical evidence
17 that would support Plaintiff's shortness of breath as a severe
18 impairment. (Tr. 22-23.) The ALJ also contrasted Plaintiff's
19 allegations about his limitations with his medical records and test
20 results. (Tr. 23.) The ALJ provided a similar analysis related to
21 Plaintiff's daily activities. (Tr. 23.)

22 Plaintiff's contention that the ALJ failed to provide specific
23 reasons for rejecting Plaintiff's credibility fails. The ALJ listed
24 several reasons for finding Plaintiff incredible - his noncompliance
25 with treatment, lack of objective medical evidence supporting his
26 claims, effective treatment alleviating symptoms and daily
27 activities that belied the claims of disability. These are all
28 proper bases for determining credibility. See *Tommasetti*, 533 F.3d

1 at 1039.

2 Moreover, the record supports the ALJ's conclusion. Prior to
3 the claims period, Plaintiff was diagnosed with diabetes. (Tr. 864.)
4 The record indicates a period where Plaintiff did not monitor his
5 diabetes. (Tr. 840; 859.) But when Plaintiff monitored his blood
6 sugar, he reported his diabetes was controlled. (Tr. 846; 848; 850;
7 853-54; 856; 858.) The record reveals Plaintiff visited his doctor
8 five times during the claims period, and he often complained of
9 peripheral neuropathy-related pain in his feet. (Tr. 846-52.) At the
10 last visit during the claims period, Plaintiff's treating physician
11 increased his dose of Neurontin to try to alleviate this condition.
12 (Tr. 846.) The records do not reveal if this new dosage effectively
13 controlled the symptoms, but it is notable that Plaintiff did not
14 return to his physician until ten months later, in June of 2005.
15 (Tr. 840.)

16 Additionally, the record does not substantiate a medical cause
17 of Plaintiff's chronic back pain, and instead an MRI revealed a mild
18 disc bulge at L4-5, with mild facet hypertrophy. Plaintiff's spinal
19 changes between 1999 and 2004 were slight, with no spinal stenosis
20 or significant foraminal encroachment present. (Tr. 868-69.)

21 Similarly, the record fails to reveal objective medical
22 evidence that substantiate Plaintiff's complaints of difficulty
23 breathing. For example, in October, 2002, Plaintiff was having
24 trouble breathing and told his physician he had asthma. Dr. McCrorey
25 prescribed an inhaler. (Tr. 862.) In August, 2003, Plaintiff's
26 asthma was stable, and after an initial complaint of COPD in
27 January, 2004, the medical records through the remainder of the
28 claims period do not mention any breathing issues. (Tr. 859-60; 858;

1 856; 854; 853; 840.)

2 Finally, the record supports the ALJ's credibility
3 determination based upon the contrast between Plaintiff's testimony
4 and his reported daily activities. Plaintiff testified at the
5 hearing that prior to December, 2004, he could not stand long enough
6 to do the dishes, take out the garbage, shop, or do much of
7 anything. (Tr. 62.) By contrast, the ALJ pointed out the Function
8 Report, authored by Plaintiff², indicates that Plaintiff can lift 25
9 pounds, stand for two to four hours, walk short distances, sit for
10 two hours, with limited bending, kneeling and overhead reaching.
11 (Tr. 148-49.) It is reasonable to assume that the Function Report
12 was completed closer in time to the claims period. By contrast,
13 Plaintiff's testimony at the hearing took place five years after the
14 claims period ended. Plaintiff's memory of his abilities during the
15 claims period likely diminished over time. In any event, substantial
16 evidence exists in the record to support the ALJ's negative
17 credibility finding for Plaintiff, and the ALJ's determination of
18 Plaintiff's RFC.

19 **2. Medical Opinions.**

20 Plaintiff also argues that the ALJ erred by giving significant
21 weight to the opinion of James M. Haynes, M.D. (ECF No. 23 at 18.)
22 Plaintiff specifically points out Dr. Haynes testified that in
23 forming his opinions about Plaintiff's disability, he relied upon
24 1.04D of the Listings, but in fact, no such provision exists. (ECF

26 ²The Function Report is unsigned and undated, but because the
27 answers are in the first person, it is reasonable to conclude the
28 form was completed by Plaintiff. (Tr. 147-61.)

1 No. 23 at 18.) Additionally, Plaintiff mentions that the doctor
2 admitted he did not review the diabetes Listing and thus the ALJ's
3 reliance on Dr. Haynes was error. (ECF No. 23 at 18.)

4 In evaluating medical or psychological evidence, a treating or
5 examining physician's opinion is entitled to more weight than that
6 of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592
7 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).
8 If the treating or examining physician's opinions are not
9 contradicted, they can be rejected only with clear and convincing
10 reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can
11 only be rejected for "specific" and "legitimate" reasons that are
12 supported by substantial evidence in the record. *Andrews v. Shalala*,
13 53 F.3d 1035, 1043 (9th Cir. 1995).

14 In this case, the ALJ gave significant weight to two Physical
15 Residual Functional Capacity Assessments - a September 2007
16 assessment completed by Norman Staley, M.D. and an April, 2008
17 assessment completed by Charles Wolfe, M.D. (Tr. 24.) The ALJ noted
18 that while Plaintiff's current condition may include severe
19 impairments relating to manipulative issues and the ability to
20 stand/walk, these conditions did not exist during the claims period.
21 (Tr. 24.)

22 The ALJ also relied upon the opinion of James Haynes, M.D., in
23 determining an RFC:

24 Significant weight was given to the opinion stated
25 by Dr. Haynes. Dr. Haynes opined the claimant may have
26 been able to function at the light exertion level prior
27 to December 2004, and that from December 2004 to August
28 2008, the claimant was able to perform work at the
sedentary to light exertion level. The claimant's ability
to stand/walk progressively worsened to 1 hour per day,
but this occurred after the date last insured. The
records prior to the date last insured show early

1 development in neuropathy with pain, numbness and
2 tingling in toes and feet.

3 (Tr. 24.)

4 While Plaintiff fails to fully explain his position³, it appears
5 Plaintiff's complaint about the ALJ's reliance upon Dr. Haynes
6 involves two issues: (1) Dr. Haynes stated he relied upon the
7 neuropathy Listing - 1.04D - that does not exist; and (2) Dr. Haynes
8 admitted he did not review the diabetes Listing. While Plaintiff is
9 correct that 1.04D does not exist, a review of the record reveals
10 the ALJ did not err in relying upon Dr. Haynes' opinion.

11 During the hearing, Dr. Haynes stated that prior to December
12 31, 2004, Plaintiff was in the "very early" stages of the
13 development of neuropathy and associated diabetes that was
14 "certainly not enough" to meet a listing. (Tr. 45-46.) When asked
15 specifically about diabetes, Dr. Haynes opined that Plaintiff did
16 not meet the listing for diabetes. (Tr. 51.) He testified that
17 Plaintiff did not meet any the listings related to neuropathy. At
18 that point, the doctor stated that he did not have his reference
19 materials with him, but he thought he was relying upon Listing
20 1.04D. (Tr. 52.) Dr. Haynes admitted that he did not look at the
21 diabetes Listing, and noted that he focused on manifestation of the
22 diabetes, or the neuropathy. (Tr. 52.)

23
24 ³To the extent Plaintiff is attempting to raise the issue that
25 the ALJ erred by failing to find his diabetes met the Listing, he
26 has not briefed that argument and thus it will not be considered.
27 The court is unable to consider matters that are not "specifically
28 and distinctly argued" in a party's brief. *Carmickle v.*
Commissioner, Soc. Security Admin., 533 F.3d 1155, 1161 n. 2 (9th
Cir. 2008); *Paladin Associates, Inc., v. Montana Power Co.*, 328 F.3d
1145, 1164 (9th Cir. 2003).

1 The diabetes mellitus Listing is located with the endocrine
2 system impairments. The Listing, 9.08, consists of in relevant part:

3 [n]europathy demonstrated by significant and persistent
4 disorganization of motor function in two extremities
5 resulting in sustained disturbance of gross and dexterous
6 movements, or gait and station ... or (b) acidosis
7 occurring at least on the average of once every 2 months
8 documented by appropriate blood chemicals tests ...

9 20 CFR Pt. 404, Subpt. P, App. 1 at 9.08.

10 Dr. Haynes' testimony⁴ is supported by the record. No medical
11 record appears that supports Plaintiff suffered from "significant
12 and persistent disorganization of motor function" during the claims
13 period between October 2003 and December 2004.

14 In the absence of treatment or chart notes in the record that
15 contradict the ALJ's conclusion that Plaintiff was able to perform
16 sedentary work between October 2003 and December 2004, Dr. Haynes'
17 misstatement of Listing number for neuropathy was immaterial, and
18 the ALJ's reliance upon Dr. Haynes's opinion related to Plaintiff's
19 RFC was not error.

20 CONCLUSION

21 Having reviewed the record and the ALJ's conclusions, this
22 court finds that the ALJ's decision is free of legal error and
23 supported by substantial evidence. Accordingly,

24 IT IS ORDERED:

25 1. Defendant's Motion for Summary Judgment (**ECF No. 27**) is
26

27 ⁴Dr. Haynes also testified that prior to December 31, 2004,
28 Plaintiff would be able to perform a sedentary-to-light-duty job,
with minimal time on his feet, and no more than one hour of
standing/walking per day. (Tr. 46.) Dr. Haynes opined that
Plaintiff's sleep apnea was addressed with the CPAP device, his COPD
was caused by the pack-and-a-half cigarette smoking habit, and both
conditions would allow Plaintiff to work within the sedentary
category. (Tr. 47.)

2. Plaintiff's Motion for Summary Judgment (**ECF No. 22**) is **DENIED.**

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

DATED September 28, 2011.

S/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE